United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Court of Appeals
District of Columbia Circuit

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CLERK

162

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,505

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES HICKS,

Appellant.

APPEAL IN FORMA PAUPERIS FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES

1. Whether the Government has met its burden of proving beyond a reasonable doubt that an individual committed an armed assault when it offers only an unidentified gun and inconsistent testimonial evidence.

2. Whether a pistol may properly be admitted as evidence of an assault with a pistol, when the pistol introduced did not belong to the accused, was not found in his possession, and no effort was made by the Government to identify it beyond the fact that it was found near the scene of the alleged assault many hours later.

This case has not previously been before this Court.

REFERENCES TO RULINGS

As to Part I of the Argument:

1. Motion for acquittal made at close of Government evidence (Tr. 64), denied (Tr. 64).

2. Motion for acquittal made at close of all the evidence (Tr. 213), denied (Tr. 213).

As to Part II of the Argument:

1. Reception into evidence of pistol (Tr. 63).

STATEMENT OF THE CASE

Appellant, James Hicks, was indicted on three counts of violation of D.C. Code § 22-502 (1967), Act of March 3, 1901, ch. 854, 31 Stat. 1321, and one count of violation of D.C. Code § 22-3204 (1967), Act of July 8, 1932, ch. 465, § 4, 47 Stat. 651, as amended. Hicks pleaded not guilty to all four counts and was tried in the United States District Court for the District of Columbia on March 6 and 9, 1970. He was convicted on two of the three counts of violation of D.C. Code § 22-502, and sentenced to imprisonment of one to three years on each count, the sentences to run concurrently; on the third count of violation of § 22-502, appellant was acquitted. On the count of violation of D.C. Code § 22-3204, appellant was convicted and sentenced to a term of imprisonment not to exceed one year, to run concurrently with the sentences on the other two counts. (Order of Judgment and Commitment, May 28, 1970.) The District Court had jurisdiction pursuant to the Act of December 23, 1963, § 1, 77 Stat. 482, D.C. Code § 11-521 (1966). This Court has jurisdiction of the appeal pursuant to the Act of June 25, 1948, ch. 646, 62 Stat. 929, 930, as amended, 28 U.S.C. § 1291, 1294 (1966).

The incident out of which the charge arose took place in the parking lot of an apartment building on Jasper Street, S.E., at about midnight on Saturday, May 24, 1969. Several persons came out of the building and encountered appellant and several of his companions. Some words were exchanged, apparently involving the fact that appellant and his companions

were looking for a party, and then a brief scuffle followed. The testimony of the five witnesses, while agreeing on this much, is confused concerning the details of the scuffle.

At the trial, the three victims of the alleged assault, William L. Johnson, William L. Boxley, and Rudolph Moore, testified for the Government, as did a police officer named Travis M. Daniels. Johnson's description of the incident in question was as follows:

> Johnson and several friends, including Boxley, were playing cards in his apartment. Shortly after midnight, Johnson and Boxley went outside to inform Moore, who was sitting in his car in the apartment parking lot "cooling off," that it was his turn to play cards (Tr. 4-5). As they approached the car, they were met by appellant and five companions (Tr. 5). After inquiring about the location of a party and indicating that his pants were torn and that he therefore wanted a ride, Hicks pulled a small dark automatic pistol from a coat pocket, as did one of his companions, and another companion pulled a knife (Tr. 6-7). The man with the knife then put it to Boxley's throat, while Moore backed away into the basement of the apartment building (Tr. 8). (Moore was apparently out of his car by this time.)
>
> At this point, Hicks and his companions began "grappling" among themselves, and Johnson, Boxley and Moore went back into Johnson's apartment. There Johnson, a police officer with the Metropolitan Police Department, picked up his service revolver

and returned to the parking lot (Tr. 9). Hicks, walking on a sidewalk away from the parking lot and now "fifty or sixty feet" from the apartment, stopped when Johnson identified himself as a police officer and indicated that Hicks was under arrest (Tr. 9). Hicks' companions were running "far ahead" of him and did not stop (Tr. 10). Johnson searched Hicks but found no weapon. He then searched the area, but he said he was unable to obtain a flashlight for the latter search; no weapon was found (Tr. 10-11). At the time of the arrest, Johnson asked "some neighbors" to call the police (Tr. 10).

Both Boxley and Moore testified concerning the incident. While their testimony tends generally to corroborate Johnson's version, there are numerous inconsistencies. For example, the testimony of these three witnesses is markedly contradictory on such facts as whether a defense witness was one of those involved, how Moore came to be on the scene, the sequence of events, and other significant details. (The testimony of these three witnesses is examined in detail in Argument I, at p. 8 , infra.)

Officer Daniels arrived at the parking lot immediately after Johnson arrested appellant (Tr. 56). Daniels testified that he knew of no search conducted (Tr. 58), and he gave no testimony of any account of the incident being given him at that time by any of the witnesses nor any allegations concerning a gun; no one gave him a description of the persons involved in the alleged assault (Tr. 212). Daniels drove appellant to the police station in his patrol wagon (Tr. 210-211).

The other evidence relied upon at trial by the Government was a .25 caliber semi-automatic pistol. This gun was identified by Officer Travis Daniels of the Metropolitan Police Department as the gun he found, approximately eight hours after the alleged assault, on the ground in front of an apartment building at 2631 Jasper Street, S.E. (Tr. 61). That building is separated from the apartment building in which Johnson lived, 2639 Jasper, by the parking lot in which the assault is alleged to have taken place (Tr. 14-15). Daniels testified that the gun was on the ground beside a "male approximately eight years of age lying on the ground" (Tr. 58). Daniels gave hearsay testimony, to which defense counsel failed to object, that the boy had shot himself (Tr. 59) and that the boy had found the gun "alongside" of 2631 Jasper (Tr. 61). Daniels testified that he was told the location by the boy's thirteen-year-old sister. Neither the boy nor his sister testified, although the boy is noted to have been present at the trial (Tr. 52). The hearsay nature of Daniels' testimony was noted by the trial judge (Tr. 52-53).

Daniels pointed to a map to indicate both the location of the boy and the area in which he was told the gun was found; there is nothing in the record to establish either with any precision.

Daniels, after scratching his initials on it, entered the pistol in the police property book and left it at the No. 11 Precinct station house (Tr. 59). About one week later, Johnson learned of the weapon found by Daniels and, after examining it, scratched his initials on it.

No identification of any kind was offered for the gun at trial. No police report was offered concerning the incident of the finding of the gun and the young boy who was alleged to have shot himself.

Both Hicks and Jeter, a defense witness who was one of Hicks' companions during the incident, testified that a brief encounter did take place in the parking lot that night. Jeter corroborated Hicks recollection that neither they nor anyone in their party possessed weapons at that time (Tr. 68, 83). The only weapons used, according to both Jeter and Hicks, were three guns, one a shotgun, brought out of the apartment by Johnson and his friends after their retreat from the original skirmish (Tr. 83, 90).

RULES INVOLVED

Federal Rule of Criminal Procedure 29(a):

Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Federal Rule of Criminal Procedure 52(b):

Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I.

Appellant was convicted of assault with a dangerous weapon, as well as unlawful possession, on the basis of the testimony of three witnesses who claimed to have been victims of the assault and the introduction into evidence of a gun said to have been found later near the scene of the assault. The gun was wholly unidentified, and without the supporting testimonial evidence was so incomplete and contradictory that it could not support a guilty verdict. The Government failed to meet its burden of offering sufficient evidence to allow a reasonable mind to conclude guilt beyond a reasonable doubt.

II.

The most glaring defect in the Government's offer of evidence was the fact that its own testimonial evidence established that appellant did not flee the scene of the alleged assault, did not have on his person a weapon when he was arrested, although the arrest followed the alleged assault almost immediately, and a search of the area of the arrest failed to turn up a weapon of any kind. To shore up this weakness, the Government introduced a pistol said to have been found the morning after the alleged assault. However, no relevant identification of any kind was ever offered

at trial for the gun, nor was any evidence offered as to official records of the police finding or investigating the gun. The pistol, in addition to its natural harmful effect as a deadly weapon, in this case filled a critical evidentiary breach in the Government's case. In light of this heavy prejudicial effect, the Government was obligated to show very significant probative value in the gun. The Government having failed to do so in any respect, the gun and the testimony concerning it ought to have been excluded as unduly prejudicial.

ARGUMENT

I. <u>There Was Not Sufficient Evidence Against Appellant As To Any Count To Remove Reasonable Doubt Of His Guilt, So That It Was Error Not To Grant His Motion For Acquittal</u>.

> With respect to Point I, the appellant desires the Court to read the following pages of the reporter's transcript: Tr. 4-5, 7-10, 21-23, 31-35, 40-41, 43, 45-49, 57-58, 64, 96, 208, 213.

On the Government's failure to make out a prime facie case against appellant, a motion for acquittal was sought,[1/] and it was error not to grant it, as a review of the evidence shows.

The case against appellant failed to meet the standard set by this court to govern the disposition of a motion for acquittal:

1/ A motion for acquittal was sought at the close of the Government's case (Tr. 64) and at the close of the trial (Tr. 213), and was denied each time.

> The true rule therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion.
>
> Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229, 232, cert. denied 331 U.S. 837, reh. denied 331 U.S. 869 (1947)

Granting maximum credibility to Government witnesses, there still remained at trial a reasonable doubt, as a matter of law, as to appellant's guilt. The prosecution's case was founded on two items: a pistol and the testimony of three witnesses. As demonstrated in Argument II, the pistol was so thoroughly unidentified as to be of the most remote probative value. Such value could only be recognized if the witnesses' testimony was firm and definite. In fact, however, that testimony is permeated with conflicts between witnesses and by flat contradictions within the testimony of individual witnesses. So confused and contradictory was their testimony that, even allowing it a presumption of credibility for purposes of the motion for acquittal, reasonable doubt could not have been erased.

In order to assess the inadequacy of the Government's narrative, it is necessary to examine only briefly the eight most damaging defects in the eyewitness testimony. These elements show clearly that there is no single consistent story among the three.

1. On the first day of the two-day trial, on a Friday, Johnson was asked by defense counsel whether the witness Jeter had been involved.

Johnson answered that Jeter had been one of appellant's companions (Tr. 22). On the second day of the trial, the next Monday, Johnson was again asked about Jeter, as follows:

> Q. Do you recall me asking you whether Mr. Jeeter (sic) was involved the other day?
>
> A. Yes, sir, I do.
>
> Q. Do you remember your answer?
>
> A. I don't recall offhand exactly what my answer was. I didn't remember him.
>
> Q. Do you remember me asking you whether or not he was involved?
>
> A. No, sir, I do not. (Tr. 208)

Viewed in the most charitable light, this exchange establishes that Johnson could not keep his story straight over a week-end, yet he was claiming to remember in impressive detail events occurring in a parking lot at midnight on a Saturday night almost a year before.

2. It was established beyond doubt that immediately before the confrontation in the parking lot, Moore was sitting in his car (Tr. 5, 31, 47). However, Johnson, Boxley, and Moore had three widely divergent recollections of how Moore came to be in the car at that time. According to Johnson:

> Well, friends and I were having a card game in my apartment and another friend of ours was sitting outside in a car cooling off.
>
> It was rather warm in the apartment and it was his turn to play cards. We went outside to inform him . . . (Tr. 4-5).

According to Boxley, Moore was just arriving home from work and had not been at the card game at all (Tr. 32, 40, 41).

Moore himself offers more variations. He claimed that he had been to a friend's house in Northeast Washington earlier in the evening and that as he "got to the parking lot and getting out of the car," the assault took place (Tr. 43). And a little later Moore changed his version. He was not just arriving at the time of the confrontation, but had been sitting in his car "for a couple of hours" (Tr. 47).

The most superficial examination of these three stories leads to an inescapable conclusion that Moore was in his car in a more or less advanced stage of intoxication and that a clumsy effort was being made at trial to cover up that fact. Such transparent fabrications must necessarily cast doubt on the whole Government narrative of the scuffle.

3. Moore was unable to remember consistently whether he had been drinking that evening or not. When asked how much he had had to drink, he answered that at the time of the assault he had not had anything to drink (Tr. 48). Only minutes later, in answer to a question about what he had done earlier that night, he said that he had had a "couple of shots" of Scotch (Tr. 49).

4. Johnson in his original description of the assault recalled that two guns were employed, one in the possession of appellant and another held by another member of appellant's group (Tr. 7). After introduction of the gun found the next morning, Johnson was asked on cross-examination how many pistols he saw during the incident, and his reply was

A. That one and my pistol.

Q. You saw only two pistols?

A. Right, sir. (Tr. 21-22)

On redirect examination, under prodding by the Government, Johnson's gun count reverted to the earlier three:

Q. Officer, I believe that you testified that you saw two guns that night?

A. Right, sir. I did see two guns that night, right.

Q. Now, Officer, this is in addition to your gun?

A. Right. It would be two in addition to my gun. (Tr. 23)

5. While all three witnesses remembered a knife being drawn, their accounts are confusing and do not complement each other. Johnson remembered seeing the man with the knife putting it to Boxley's throat, at which time Moore began backing away, and then the man with the knife turned towards Moore. As he advanced towards Moore, Johnson was unable to see "after a certain point" (Tr. 8). Boxley, on the other hand, recalled that the man with the knife first cut Moore, and then when Moore jumped over a "railing that leads in the laundry room" the knife wielder came up to him and put the knife to his throat (Tr. 33, 34). Moore's sequence parallels Boxley's, except that Moore does not acknowledge being cut but only threatened (Tr. 45).

6. The police arrived on the scene shortly after the arrest, but recollections differed on how they were requested.

Johnson testified that after he had returned outside from his apartment and made the arrest of appellant, he asked some of his neighbors to call the police (Tr. 10). Both Boxley and Moore indicated that while Johnson was in the apartment he asked his wife to call the police (Tr. 35, 46).

7. Exactly how the three witnesses retreated into Johnson's apartment, in the face of three allegedly armed and belligerent men, was not made clear. Johnson stated that while appellant and his companions "grappled" among themselves, he and Boxley went the twenty-five feet back into the apartment, and then Moore came up from the basement (Tr. 9). Boxley testified that when the knife was put to his throat, one of appellant's party pulled the knife wielder away; then Boxley went back to the apartment (Tr. 35). Boxley's testimony was silent as to how Moore got back inside. Moore, however, testified that when appellant and the others began arguing among themselves, Johnson and Boxley grabbed him by the arm and took him inside with them (Tr. 96).

8. There is no indication in the testimony of the three witnesses and Officer Daniels that anything was said to Daniels, when he responded to a call to the parking lot after the alleged assault, about a pistol. This is so even though Daniels remembered talking to Johnson at the scene (Tr. 57). Daniels remembered nothing about any search being made or organized while he was on the scene (Tr. 58). No police record of such a search by on-duty policemen was offered into evidence. Johnson attempted to explain the failure to find a gun by his initial inability to obtain a

flashlight at the time he arrested Hicks. However, "a number of scout cars and a patrol wagon arrived on the scene" (Johnson, Tr. 10), and it must be assumed that a flashlight was then available, although no search for a gun was made.

These gaping holes in the Government's story clearly indicate either thorough unreliability of the witnesses or a critically defective proffer of evidence. In either case, reasonable doubt not only must linger but must loom over every aspect of the case.

The sum of these three witnesses' testimony, so rife with inconsistencies as to both major facts and detail, does not amount to a case substantial enough to allow a reasonable mind to conclude guilt beyond a reasonable doubt. Too much is left unexplained. Too great a possibility has been allowed to remain that there is no single underlying truth to the witnesses' stories. In fact, indications abound in their testimony that their disjointed tales, if not consciously fabricated, were sloppily thrown together out of a collection of half-memories and vindictiveness. The alleged assault occurred, after all, on a parking lot at midnight on a warm night in May. The Government witnesses had just come outside from a card game at which drinking had taken place during the course of the evening. (The witnesses were blatantly evasive about the extent of their drinking (Tr. 21, 40, 49).) It was not contested by appellant that a scuffle did occur between members of the two groups. On the sketchy and dubious presentation by the Government, a strong suspicion is created that the three witnesses were using the judicial machinery to vindicate

themselves in what seemed to have been a brief, confusing private encounter. The totality of the evidence against appellant did nothing to allay that suspicion.

If a man is convicted on the basis of witness testimony, that testimony must be more fully and clearly developed than was the case here. So long as there are such gaps and paradoxes in the evidence, no matter that the witnesses be presumed to be telling the truth as they know it, reasonable doubts must necessarily exist. A conviction must not be allowed to stand on such a shoddy foundation as that formed by the accounts of these three witnesses. Denial of appellant's motion for acquittal was error and should be reversed.

II. <u>The Introduction Of The Pistol Into Evidence Was Unduly Prejudicial To Appellant, So That Failure To Exclude It Was Error</u>.

> With respect to Point II, the appellant desires the Court to read the following pages of the reporter's transcript: Tr. 8-9, 15, 18-20, 22, 33-34, 36, 45-46, 59-61, 63.

The admission into evidence against appellant of the pistol was clearly prejudicial to him. (Pistol identified at Tr. 18-20, 60; offered and received at Tr. 63.) Its nature as a deadly weapon was bound to have an inflammatory effect on the jurors' minds; in addition, it provided the missing link in the Government's evidence, an object upon which the jury was naturally prepared to seize to explain the fact that appellant, although searched within minutes of the alleged assault, was found to be unarmed. Under these circumstances, it was incumbent upon the Government to show a high degree of probative value in the gun. Having made no effort to

identify the gun in any meaningful way, the Government fell far short of showing the degree of relevance required to outweigh such damaging prejudice. It was thus plain error to admit the gun.

The total offer of material proof about the gun consisted of the following:

1. Evidence that it was not registered to Hicks (Stipulation, Tr. 63).

2. Hearsay testimony that it was found, some seven to eight hours after the assault, near the point of assault. The exact distance is not ascertainable from the record (Tr. 61).

3. Testimony that it was similar in appearance to the gun which appellant is said to have had--"a small dark automatic pistol" (Tr. 18).

4. Testimony that when it was fired a week later it was in working condition (Tr. 20).

Thus the offer of evidence is based on the proposition that an unidentified pistol, not belonging to appellant, found in the possession of an uninvolved party the morning after an assault said to have involved two guns similar in appearance to the one offered, is probative of the fact that appellant had the pistol during the assault. No attempt whatever was made to tie the weapon more closely to appellant, indeed no attempt was made to limit in any way the countless possible explanations for the gun's presence where Daniels found it.

Courts have always recognized the obligation in criminal trials to scrutinize possibly prejudicial evidence to assure that it was so relevant

to facts in issue as to outweigh, as a matter of judicial policy, any effects detrimental to the accused. See, e.g., United States v. Mullings, 364 F.2d 173 (2d Cir. 1966). This court has been vigilant to maintain its policy of excluding damaging evidence which is not highly relevant. In Macklin v. United States, 133 U.S.App.D.C. 347, 410 F.2d 1046 (1969) the court, dealing with the prejudicial effect of minimally relevant firearms, reversed a conviction because of the failure of the trial court to exclude the weapons. The accused had been arrested while sitting in an automobile with three companions; police had testified that four pistols were found, one on each person in the car. On trial for possession, the accused took the stand and said that there were no guns taken from anyone in the car. Purportedly for impeachment purposes, the guns identified as taken from the three companions were admitted into evidence. This court, while noting that an argument could be made that the evidence had a direct bearing on the question of the reliability of the accused's story, nonetheless held it reversible error to have admitted the three weapons because of the degree of prejudice involved. Similarly, in Davis v. United States, 133 U.S.App.D.C. 167, 409 F.2d 453 (1969), it was deemed error, but not reversible error in the context of that case, to have admitted evidence of the accused's penniless financial status before the robbery to show motive. The evidence was deemed not to meet the standard of "highly probative." 409 F.2d 458.

The total failure of the Government to connect the pistol with Hicks can be seen by considering the possibilities for such connection. There

was no indication at trial whether or not the pistol introduced had ever been checked for fingerprints, or what the results were if such a check was made. On the facts as presented by the Government, if the gun had been one carried by Hicks, his fingerprints would certainly have been on it. There is no indication that any attempt, through registration or otherwise, had ever been made to trace the gun to its owner. No evidence was offered that appellant had ever before been known to have owned or possessed a weapon of any kind, much less one similar to the pistol introduced.

Nor was the possibility excluded that the gun had been lying on the ground for days or weeks. Particularly since neither the boy nor his sister were on the stand, the background of the gun remained totally unexplained. It is quite possible that Daniels was not told the truth; the boy and girl may have found the gun almost anywhere, or even stolen it. Indeed, the story, "I found it," is a commonplace cover-up to account for the possession of a stolen item. Possibilities abound. There is no justification for relying on the ambiguous, non-verbal communication, related to the jury only through hearsay, of a thirteen year old girl whose smaller brother had just critically wounded himself while one or both of them had been handling a loaded pistol.

In fact, beyond not proving much, the gun's presence on the ground seems to contradict the Government's version of the incident. It was said by the Government witnesses (Tr. 8-9, 33-34, 45-46) that appellant was holding a gun when the three witnesses retreated into the apartment. When

Johnson came back out, appellant was only "fifty or sixty feet" from him (Tr. 9) in an area which from all the testimony was well-lighted (Tr. 15, 36). No indication is given in the record that at that time appellant, or anyone else, made any motion that could be interpreted as throwing or dropping a gun. So the only other possibility is that appellant, for unexplained and seemingly inexplicable reasons, abandoned the gun in the short space during which Johnson and the others were in the apartment, while under no threat and while the other gun and the knife said to have been involved were not abandoned.

Moreover, no pistol was turned up in Johnson's search. Johnson testified that it was too dark on the other side of Jasper Street to make an effective search there (Tr. 22), but there ought to have been little difficulty in finding it if it had been where the Government indicated it was found.

Although it was said by Officer Daniels at trial that the pistol was found by a young boy who then shot himself with it (Tr. 59), the record contains no official report at all about that shooting. Here we are presented in the record with a case of an eight-year old boy critically wounding himself with the deadly weapon in evidence, and yet the Government is totally silent concerning any official record of that shooting. By that silence, appellant was deprived of the benefit of any police investigation into the shooting and even the benefit of knowing whether one was

made.[2/] Any inquiry at all concerning the gun would have shed some light, one way or the other, on appellant's connection with the gun.

The strand of tenuous inferences connecting the pistol with appellant is far too weak to support such a prejudicial and inflammatory admission of evidence. Failure to exclude the gun under these circumstances and admission of the hearsay testimony concerning the gun, in plain error affecting substantial rights which requires reversal consistent with Federal Rule of Criminal Procedure 52(b).

2/ It is a well-settled rule of law that the unexplained failure of a party to produce evidence within his possession which bears directly on the contested issues at trial is itself some proof that the tenor of the undisclosed evidence is unfavorable to that party. Wigmore, Evidence §§ 290, 291 (3d ed. 1940); see Washington Gas Light Co. v. Biancaniello, 87 U.S.App.D.C. 164, 183 F.2d 982 (1950).

CONCLUSION

For the reasons stated in Part I of this Brief, it was error for the trial court to deny the appellant's motion for acquittal. The court should reverse the judgment of the trial court and remand the case to the trial court with instructions to enter a judgment of acquittal.

Even if there were sufficient evidence to send the case to the jury, it was error, for the reasons stated in Part II, for the trial court to admit the pistol into evidence. Thus, even if the Court were to affirm as to Part I, it should reverse the judgment of the trial court and remand the case to the trial court for appropriate further proceedings.

Respectfully submitted,

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Attorneys for Appellant
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January 15, 1971

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 1971, two copies of the Brief for Appellant were served upon the attorney for the Appellee, the Honorable Thomas A. Flannery, United States Attorney for the District of Columbia, by delivering it to his office at the United States Court House, Constitution Avenue and John Marshall Place, Washington, D. C.

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TABLE OF CASES

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ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Was the evidence sufficient to warrant jury consideration at the close of the Government's case, and to sustain the convictions for assault with a dangerous weapon, where three victims testified that appellant and his companions encountered them on a parking lot and appellant brandished a pistol after apparent dissatisfaction with responses to his inquiries?

II. Was there a sufficient evidentiary basis for admitting in evidence a pistol found near the scene a short time after the instant assaults and which appeared to be similar to the weapon wielded by appellant?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 1330–69

UNITED STATES OF AMERICA, APPELLEE

v.

JAMES HICKS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a four count indictment with assault with a dangerous weapon (22 D.C. Code § 502) against William Johnson, William Boxley, and Rudolph Moore (counts 1–3 respectively), and with carrying a dangerous weapon, *i.e.*, pistol (22 D.C. Code § 3204-count 4). After trial by jury March 6 and 9, 1970 before Judge John L. Smith, Jr., appellant was found guilty on all counts except the assault with a dangerous weapon offense against Rudolph Moore (count 3). Thereafter he was sentenced to concurrent terms of imprisonment of one to three years for the assault offenses and, concurrent to them, to one year for the weapon offense.

GOVERNMENT'S EVIDENCE

The offenses developed from a fortuitous confrontation of appellant and several companions with the complainants on a parking lot adjacent to complainant Johnson's apartment

building, 2639 Jasper Street, S.E., around 12:15 Sunday morning on March 25, 1969.

Complainant Johnson

After finishing a card game with friends in his apartment complainants Johnson and Boxley went outside to the parking lot near his apartment to have Rudolph Moore, who was then "cooling off" in his car, to go inside to play a hand of cards (Tr. 4–5, 20). While the three of them talked, they were approached by six men, one of whom, appellant, asked the whereabouts of the "2000 block". Complainant Johnson replied that there was no 2000 block in the area but appellant persisted with his inquiries. Appellant stated that his pants had been torn and that he needed a ride some place, and Johnson told him he could not give him a ride. Appellant then pressed inquiries about a "party" concerning which Johnson and his friends indicated they had no knowledge. Drawing a small dark automatic pistol and pointing it towards Boxley, appellant said "I will make a party". Johnson, an off-duty metropolitan police officer who was wearing his holster without the gun (Tr. 3, 7), turned away from appellant to prevent notice of the holster, which caused appellant to say several times in effect, "if you make another move, MF, I will kill you". Another person in appellant's group brandished a pistol and pointed it toward Boxley and Moore, while appellant continued to state that "he was going to make a party" and that he was going to kill Johnson (Tr. 6–7). A third person in appellant's group pulled a knife and put it to the throat of Boxley, but when Moore backed away, the knifeman pursued him, though unable to prevent his escape into the basement of the apartment building (Tr. 7–8). Johnson was not able to observe these events too clearly because appellant was pointing the gun in his face (Tr. 8).

Soon two or three other fellows in appellant's group tried to persuade appellant not to harm Johnson and his companions since they had not done anything to them, and the persuasion took the form of physical restraint as some "grappling" ensued. This gave Johnson and Boxley, who were joined by

Moore, a chance to go into Johnson's apartment where Johnson got his service revolver and asked that the police be summoned (Tr. 8–9). Returning to the parking lot he apprehended appellant, lagging behind his companions who had run far ahead (Tr. 10). A search of appellant and the surrounding area in the darkness failed to reveal his weapon (Tr. 10–11, 22–23).

William L. Boxley

After leaving the card game with Johnson for fresh air and to meet Moore, who was alighting from his car on the parking lot, Boxley and Johnson were approached by six males, one of whom, appellant, inquired about a party (Tr. 32–33). Apparently dissatisfied with the response that there was not a party, appellant and another drew guns while a third person pulled out a knife (Tr. 32). Appellant pointed his gun, which appeared to be a small dark automatic, at Johnson and Boxley and warned them not to move or "he would blow [their] heads off" (Tr. 32–34, 36). The man with the knife wielded it at Moore who fled and then placed it at the throat of Boxley, verbally threatening to cut him (Tr. 33–35, 40). Other members of appellant's group tried to reason with those having weapons to prevent any harm, and one grabbed the knifeman's hand, pulling it away from Boxley's neck (Tr. 34–35). When argument among them followed, Boxley and Johnson were able to run into the apartment building, where Johnson got his service revolver and told his wife to call the police. As Johnson returned, he was able to stop appellant before he left the parking lot, while the others fled (Tr. 36–37). Boxley denied having a shotgun himself or hearing one fired (Tr. 38).

Rudolph Moore

Mr. Moore lived at 2637 Jasper Street, S.E., next door to complainant Johnson and had been sitting in his car awhile before talking briefly with Johnson and Boxley and then walking with them toward the apartment building (Tr. 42, 47, 49). After six men approached them and inquired about a certain address and about a party, two of the men drew small dark pistols, proclaiming they were going to "make a party" (Tr. 44–

45, 48, 50). Appellant pointed his gun at Boxley while his companion pointed his at Johnson, with warnings not to move. When a third man drew a knife, opened it, and moved menancingly toward Moore, Moore backed away and ran to safety by jumping a railing (Tr. 45, 48). Soon the knifeman approached Boxley, (who had told Moore not to run) and put the knife to his throat, when others in appellant's group forcibly interceded, giving Johnson, Boxley, and Moore a chance to run into the apartment building. Johnson got his service revolver, returned outside, and commanded the men, who were then running from the parking lot to the street at the sound of sirens, to halt (Tr. 46). Only appellant who was behind the others did so (Tr. 46–47).

Officer Travis Daniels

When Officer Daniels arrived on the scene in response to a report of a policeman in trouble, appellant was already under arrest. Later around 7:50 the same morning however, he had to respond to a report of a shooting directly in front of 2631 Jasper Street, S.E., an apartment building in the same vicinity of complainant's Johnson's residence at 2639 Jasper Street, and near the same parking lot (Tr. 54–56, 58). There he found an eight-year-old boy who had apparently accidentally shot himself, lying on the ground (Tr. 58, 59). A pistol was observed beside him, which the boy's sister indicated had been found in a grassy area alongside 2631 Jasper Street (Tr. 59, 61). (The pistol a .25 caliber automatic had one spent round and one live round (Tr. 59–60), and was identified by Officer Johnson, a complainant, as similar to the one appellant had during the instant offenses, Tr. 17–19.)

DEFENSE EVIDENCE

John Jeter

Jeter testified that he was with appellant and two others whom he had just met on the night in question and they were looking for a party in the 2600 block of Jasper Street, S.E. (Tr. 66–74). They approached four men (Johnson, Boxley, Moore, and another) gathered at a car on a parking lot and appellant

asked the whereabouts of a party (Tr. 66, 76–79). An argument and then a scuffle developed between some persons in Johnson's group and appellant's group (Tr. 79, 82). Appellant indicated he would break it up; complainant Johnson said he would (Tr. 80–81). Sometimes during this incident Boxley went away and came back with a shotgun, which he fired. Two other persons including Johnson displayed pistols, though no one in appellant's group had any (Tr. 66, 80–83). Witness Jeter ran behind some bushes but observed Boxley strike appellant in the face and stomach with the shotgun and Johnson strike him in the face with his fist after the scuffle had ended (Tr. 69, 82–86). He later returned to the scene to ask the release of appellant, who had been arrested. Threatened with arrest himself, he left (Tr. 69, 86).

Appellant

Shortly after asking who was giving a party so that he might go inside and request a pin for his torn pants, appellant testified that a scuffle ensued between one of his friends and someone with complainant Johnson (Tr. 88). Johnson started to break up the scuffle but appellant said he would and did so (Tr. 88–89). By that time however, Johnson and two others had walked away and returned with firearms (Tr. 89, 98, 103, 104, 106–107). When someone fired a shotgun and Johnson announced he was a police officer, all of his companions ran, but appellant remained, claiming that he had not done anything (Tr. 105). Appellant was arrested on the parking lot and claimed that he was never in front of the 2631 apartment building and never had a gun (Tr. 90).

REBUTTAL

Johnson, among other things, indicated he did not strike appellant, nor did anyone else during the encounter on the parking lot (Tr. 202–203). Moreover, he never saw a shotgun on the scene (Tr. 202–203). A police report, prepared by Johnson, the off-duty officer, a week before he obtained the pistol introduced in evidence, described appellant's weapon as a small automatic (Tr. 206).

Officer Daniels, who transported appellant to the police station after his arrest, said he observed no bruises or apparent injuries on appellant and that appellant did not make a complaint to him about any (Tr. 210–211).

ARGUMENT

I. The evidence was sufficient to withstand a motion for judgment of acquittal at the close of the Government's case, and to support the guilty verdict.

While "[g]ranting maximum credibility to Government witnesses", appellant somehow still feels the Government did not establish a *prima facie* case on the instant charges and that the trial court should have accordingly withheld the Government's evidence from jury consideration. (Appellant's brief, pp. 8–15). Appellant fails to realize that the complaints comprising his instant claim were matters which, if not all together remote, presented no more than the traditional questions of credibility and fact determination.[1] Such questions fall for resolution wholly within the province of the trier of fact, here the jury—even in a close case, which this was surely not. *Thompson* v. *United States*, 132 U.S. App. D.C. 38, 405 F. 2d 1106 (1968); see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied*, 331 U.S. 837 (1947); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F. 2d 332 (1967). The discriminat-

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[1] He asserts, for example, (1) the poor recollection of complainant Johnson regarding observation of a defense witness on the scene where at least four other members of appellant's group, all strangers, were present, (2) the discrepant explanations for Moore's presence in his car on his parking lot where the assaults later occurred, (3) the equivocation about the amount of alcoholic consumption, (4) some vagueness in the number of guns observed on the scene, (5) the confusing accounts about the manner in which a knife was used by appellant's companion, (6) the uncertainty as to how prompt police assistance was effectuated, (7) the apparent mystery in the complainants successful retreat to the apartment building when members of appellant's group interceded against appellant and the others with weapons, and (8) the failure to say anything about a gun to one of the police officers, Officer Daniels, who arrived on the scene after appellant had been apprehended and searched by complainant Johnson, also a police officer, and found then to be without any weapon. (Appellant's brief, pp. 10–13).

ing verdicts of guilty, having been returned,[2] can be sustained upon the substantial evidence apparent on this record. See Counterstatement herein.

II. Admitting the pistol into evidence was not error.

(Tr. 8, 10, 18, 22–23, 34–37, 39, 46–47, 58–61)

Appellant claims that there was a "total failure of the Government to connect the pistol with [him]" and therefore, its admission into evidence, even without objection, was improper (Tr. 62). (Appellant's brief, pp. 15–20, 17). There was a sufficient evidentiary basis for admission of the pistol, and appellant's claim, if anything, goes only to the weight to be given the evidence concerning the pistol and not to its admissibility.

Three witnesses, Johnson, Boxley, and Moore, described the pistol appellant had as small and dark (Tr. 8, 36, 39, 50). Boxley and Johnson, a policeman undoubtedly experienced in identifying firearms who apparently observed appellant's pistol at close range, described it specifically as an automatic (Tr. 8, 36, 39). Although appellant was without a weapon when searched following his abortive departure (but his companions' successful flight) from the scene, it is quite apparent that appellant had ample opportunity to throw his pistol away in the time it took Officer Johnson to get his own weapon and to apprehend him (Tr. 9–10, 34–35, 37, 46–47). Efforts to recover it in the darkness proved to be unavailing (Tr. 10, 22–23, 34–35, 37). It is not surprising that a pistol should be discovered in the early daylight a few hours later in the vicinity of these assaults—unfortunately too late to spare accidental injury to its youthful finder (Tr. 58–61); nor was it mere coincidence that it should be a .25 caliber small dark automatic, meeting the *consistent* description of witnesses, and being similar to the one Officer Johnson recalled appellant pointing in his face on the well-lighted parking lot (Tr. 8, 18). These circumstances were sufficient to warrant admission of the pistol into evidence

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[2] Appellant was acquitted of the assault with a dangerous weapon against complainant Moore who fled when accosted by a knife wielder in appellant's group.

and to support appellant's conviction for unlawfully carrying it.[3]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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JOHN A. TERRY,
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Assistant United States Attorneys.

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[3] *Macklin* v. *United States*, 133 U.S. App. D.C. 347, 410 F. 2d 1046 (1969), as the other case cited by appellant (Appellant's brief, p. 17), is inapposite, where, as here, there was ample testimony to show possession of the weapon by the appellant, but the introduction of *additional* guns there seized from appellant's companions at the time of the arrests was improper on the theory of impeachment.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,505

UNITED STATES OF AMERICA,

Appellee

v.

JAMES HICKS,

Appellant

APPEAL IN FORMA PAUPERIS FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

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UNITED STATES COURT OF APPEALS
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Appeal from the United States District Court
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REPLY BRIEF FOR APPELLANT

ARGUMENT

I. There Was Not Sufficient Evidence Against Appellant As To Any Count To Remove Reasonable Doubt Of His Guilt, So That It Was Error Not To Grant His Motion For Acquittal.

The Government badly misses the point when it characterizes this appeal as involving only "questions [which] fall for resolution wholly within the province of the trier of fact." (Appellee's brief, p. 6). The critical point is that prosecution evidence must reach a certain minimum level of internal consistency before the question of guilt is put before the jury, and in this instance the Government's case manifestly failed to achieve such a level. Thompson v. United States, 132 U.S.App.D.C. 38, 405 F.2d 1106 (1968)

(relied upon in Appellee's brief, p. 6) is not authority for sustaining the convictions here, since in Thompson there was no incoherence in the witness' story. The appeal there was based upon a claim that certain unchalleged circumstantial evidence did not provide a sufficient basis for an inference of the accused's involvement in the crime of which his co-defendant had already been convicted.

This appeal presents instead a question of whether the Government should be allowed to present to the jury three conflicting and often self-contradicting versions of its allegations. The jury is charged with choosing between the Government's description of events and the accused's story, but in order for it to exercise that function the Government must first present a version of at least superficial reliability. That burden was not met, as can be seen in the Government's own compilation, in the most euphemistic terms, of the flaws in its evidence at trial (Appellee's brief, n. 1, p. 6).

II. The Introduction Of The Pistol Into Evidence Was Unduly Prejudicial To Appellant, So That Failure To Exclude It Was Error.

The best that the Government can say for the relevance of the unidentified pistol is that "[i]t is not surprising that a pistol should be discovered in the early daylight a few hours later in the vicinity of these assaults . . . ." (Appellee's brief, p. 7). The probative value necessary to override the pistol's prejudicial effect is surely above the level of "not surprising." However, the significant thing about the Government's statement is its betrayal of a complete insensitivity to the important evidentiary issues involved. There was no evidence that the pistol was discovered "a few hours later in the

vicinity of these assaults" except utterly unprobative hearsay testimony by a police officer as to his recollection of what he had learned, approximately a year earlier, about the discovery of the pistol from a 13-year old girl who was not herself a witness at the trial. This hearsay evidence was clearly inadmissible and highly prejudicial. There was no probative evidence that the pistol was found either "a few hours later" or "in the vicinity" of the incident in question. Since the hearsay evidence was the only evidence connecting the pistol to Hicks even remotely, the error in allowing its admission is plain.

The identification of the pistol by Government witness Johnson as similar to the pistol said to have been used by Hicks was unreliable. He gave his identification only after having examined the pistol a week after the incident when it was in the possession of the police, a circumstance that must be assumed to have influenced his identification testimony at the trial.

Johnson's claim that appellant had a small automatic pistol did not by itself justify the admission of the first small automatic pistol which happened to be recovered afterward in the vicinity. Something more was required but was not provided, and so the prejudice to the appellant was not justified.

CONCLUSION

For the reasons stated in Part I of Appellant's brief and of this reply brief, the court should reverse with instructions to enter a judgment of acquittal.

For the reasons stated in Part II of Appellant's brief and this reply brief, the court should reverse and order remand to the trial court for appropriate further proceedings.

Respectfully submitted,

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March 19, 1971

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 1971, two copies of this Reply Brief for Appellant were served upon the attorney for the Appellee, the Honorable Thomas N. Flannery, United States Attorney for the District of Columbia, by delivering it to his office at the United States Court House, Constitution Avenue and John Marshall Place, Washington, D. C.

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